IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MISTY L HANNA Claimant **JP SENIOR HEALTHCARE LLC** Employer	**APPEAL 20R-UI-00584-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/13/19** **Claimant: Appellant (5)**

Iowa Code § 96.5(2) a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the November 6, 2019 (reference 01) unemployment insurance decision that denied unemployment insurance benefits to the claimant based upon her voluntarily quitting work. The parties were properly notified of the hearing. A telephone hearing was originally held on December 13, 2019 in Appeal No. 19A-UI-09147-DB-T. The claimant participated personally and the employer participated through witnesses Jennifer Kvidera and Sherri Scofield. Employer's Exhibits A through C were admitted. A decision finding that the claimant failed to file a timely appeal was issued on December 16, 2019.

Claimant filed an appeal to the Employment Appeal Board. The Employment Appeal Board issued a decision, 20B-UI-09147, on January 21, 2020, finding that the claimant's appeal was timely. The case was remanded for a decision on the merits.

Due notice was issued for another hearing date. A telephone hearing was held on February 6, 2020. The claimant participated personally. The employer participated through witnesses Jennifer Kvidera and Sherri Scofield. The administrative law judge took official notice of the hearing record from the December 13, 2019 hearing, including the Employer's Exhibits A through C, as well as the claimant's administrative records, including the fact-finding documents.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a housekeeper at the employer's nursing home. She was employed from June 6, 2019 through October 15, 2019. Claimant's job duties included doing laundry and cleaning the facility and rooms when necessary. Sherri Scofield was the claimant's immediate supervisor. Claimant's working schedule was Monday through Friday and every other weekend. Her scheduled shift began at 7:00 a.m.

The employer has a written attendance policy that the claimant received a copy of on June 6, 2019. See Exhibit A. The policy states that accumulation of 18 points in a consecutive 6-month period will result in termination. See Exhibit A. Several different amounts of points are listed in the policy based upon the type of occurrence. See Exhibit A. The policy also requires employees to notify their supervisor at least two hours prior to the employee's scheduled shift start time if they are going to be absent or late to work. See Exhibit A.

Claimant was absent on July 16, 2019 because her grandson was ill. She did not notify the employer at least two hours prior to the start of her scheduled shift that she would be absent from work.

Claimant left her scheduled shifts early on September 7, 2019 and September 8, 2019. She notified Ms. Scofield on each date that she was leaving early and she received permission to leave early on each date. She left early on each date due to her grandson being ill.

Claimant was absent from work on September 9, 2019 due to her grandson being ill. She did not notify the employer at least two hours prior to the start of her scheduled shift that she would be absent from work that date.

Claimant was absent from work on September 16, 2019 due to having to appear in court. Claimant did not notify the employer at least two hours prior to her scheduled shift start time that she would be absent that date.

Claimant was absent from work on October 15, 2019 due to her own personal illness. She did not notify the employer at least two hours prior to her scheduled shift start time that she would be absent from work that date.

Claimant had received two written warnings on September 11, 2019 and on September 17, 2019 regarding her attendance. Claimant was aware that her job was in jeopardy if she continued to be absent from work without notifying the employer at least two hours prior to her scheduled shift start time that she would be absent from work.

After notifying Ms. Scofield on October 15, 2019 that she would not be at work, Ms. Scofield responded via text message that if the claimant missed work that day, she would be over in points. When the claimant attempted to inquire about her employment, Ms. Scofield only told the claimant "hope you feel better, good luck with everything". The claimant did not report to work for further shifts because she believed that she was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related misconduct.

Iowa Code § 96.5(2) a provides:

> An individual shall be disqualified for benefits:

> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1) a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be

> considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id*. at 10. Absences due to **properly reported** illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Id.* at 558.

Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds** for which the employee was absent **and that were properly reported to the employer.** Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper,* 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id*. at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id*. at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id*.

The amount of unexcused absences must be excessive in order establish job-related misconduct. Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining

the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds Ms. Kvidera's testimony that claimant did not report her complete absences from work at least two hours prior to the start of her scheduled shifts is credible. The administrative law judge further finds that claimant's testimony that she notified her supervisor, Ms. Scofield, prior to her leaving her shifts early on September 7, 2019 and September 8, 2019 is credible.

The claimant had received two previous written warnings for her failure to report to work as scheduled. She knew that she needed to come to work on time and she understood that she needed to report any absences at least two hours prior to her scheduled shift start times.

Claimant had four unexcused absences in less than a three-month period. Those unexcused absences included July 16, 2019, September 9, 2019, September 16, 2019, and October 15, 2019. Four unexcused absences in an approximate three-month period is considered excessive.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on October 15, 2019 was not considered excused because it was not properly reported. The final absence, in combination with the claimant's history of unexcused absenteeism, amounts to job-related misconduct. Benefits are denied.

DECISION:

The November 6, 2019 (reference 01) unemployment insurance decision is modified with no change in effect. Claimant did not voluntarily quit. Claimant was discharged from employment for job-related misconduct on October 15, 2019. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/rvs